Basic Concepts of German Criminal Procedure – An Introduction

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One of the characterisations of the German as a member of the family of continental legal systems heard most often is that its procedure is inquisitorial, as opposed to the adversarial model. But what does that really mean? Is it all encapsulated in the role of the judge, or are there other features that define the character of the German procedure as inquisitorial? Is it actually still useful to use the terminology of "inquisitorial vs. adversarial"? Does "inquisitorial" not tend to convey connotations that remind us of medieval practices involving dungeons, torture, extorted confessions, draconic punishments and the personal union of prosecutor, judge and executioner in the figure of the inquisitor, or a burden on the defendant to prove their innocence etc.? Is the standard of proof in the continental systems, sometimes called intime conviction according to its French variant orfreie Überzeugung in German, really lower than the "beyond reasonable doubt" standard that common lawyers tend to be so proud of? This paper will provide an overview of the systemic model of German criminal procedure and its fundamental principles.

Introduction

One of the major distinctions often heard about the German as a member of the family of continental legal systems is that its procedure is inquisitorial as opposed to the common law adversarial model. But what does that really mean? Is it all encapsulated in the role of the judge, or are there other features that define the character of the German procedure as inquisitorial? Is it actually still useful to use the terminology of "inquisitorial vs. adversarial"? Does "inquisitorial" not tend to convey connotations that remind us of medieval practices involving dungeons, torture, extorted confessions, draconic punishments and the personal

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union[1] of prosecutor, judge and executioner in the figure of the inquisitor[2], or a burden on the defendant to prove their innocence etc.? Is the standard of proof in the continental systems, sometimes called *intime conviction* according to its French variant or *freie Überzeugung* in German, really lower than the "beyond reasonable doubt" standard that common lawyers tend to be so proud of? A quick look at the law will teach us that none of these worrisome features are part and parcel of the German approach, and indeed any modern continental procedure, even if some very high level common law practitioners and academics that I have met over the years seem to think that, for example, continental inquisitorial systems do not have an equivalent to the 5th Amendment in the US Constitution and that an accused has to cooperate with the prosecution in her own trial and prove her innocence.

These voices appear to lose sight of the fact that German law, just to name a few examples, does not accept any sort of reverse burden of proof on the defence, that the defence is in principle not obliged to provide any sort of disclosure to the prosecution or even the court or to tell them in advance the nature of the defence case, nor is the defendant at risk of adverse comment for merely exercising her right to silence in the pre-trial stage and then choosing to make a statement in court. The defendant is protected by the rule of *nemo tenetur se ipsum accusare*, i.e. no-one must cooperate in their own prosecution and conviction, to which the fact is a corollary that the defendant is not a witness in her own cause, not an object of but a subject in the proceedings[3]. She cannot therefore incur liability for perjury because she does not *testify* and is never under oath, a situation that has come to be called by many common lawyers the (in)famous "right to lie". The presumption of innocence, yet another example, is actually stronger under German law than under English law and models based on the English understanding, because it attaches until

[1] It might be worth reflecting upon the question to which extent such a personal union has been cemented in the UK by the introduction through Part 3 of the Criminal Justice Act 2003 of conditional cautions issued by the CPS and/or the police, see Peter Hungerford-Welch, *Criminal Procedure and Sentencing*, 2008, 115 ff. The equivalent to police cautions, the so-called *polizeiliche Strafverfügungen,* were abolished in Germany by § 6 of the *Einführungsgsetz zur Strafprozessordnung* (EGStPO), i.e. the Code of Criminal Procedure (Introduction) Act; their function has de facto been assumed by the *Bußgeldbescheid*, i.e. a summary fine by the administrative authority in charge, which does, however, no longer have criminal but merely administrative character and is administered under separate legislation, the *Ordnungswidrigkeitengesetz* - OWiG.

[2] A fact which as led some to argue – rightly – that the expression "judge-led" is a better representation of the material substance of the law.

[3] Evidence for this is, for example, that the defendant retains the right to ask questions to witnesses and experts, to make motions and seize the court directly of any matter even if she is represented by counsel. She is not relegated by either law or custom to sitting in the dock and merely watching the efforts of her counsel, as appears to be the case in many common law systems. In practice the picture is, however, very similar for obvious reasons and it is a rare defendant who, although represented, will conduct her own witness examination, but it is not infrequent that she will ask supplementary questions.

the conviction has become final, that is until the last avenue of appeal has been exhausted.[4] This, in the European context for example, in turn is predicated upon the understanding of what it means to be "proved guilty according to law" (Art. 6(2) ECHR): In England, this stage is (arguably[5]) reached with the jury verdict at trial, because there is no right to appeal against such a verdict absent leave being granted by the *iudex ad quem* or *iudex a quo*.[6] In Germany (with one exception[7]) and most if not all continental European countries there is an automatic right to appeal – albeit in various shapes and forms depending on which court's decision is being appealed – against a trial verdict[8] and thus a verdict cannot

[4] See for a detailed explanation in the context of international criminal law Michael Bohlander, Death of an Appellant [2010] Criminal Law Forum, 495.

[5] In theory, the logical conclusion should be that it actually stretches until the decision denying leave has become final because there is a right to ask for leave, but that may be a legal nicety.

[6] Which is in stark and somewhat odd contrast to the situation in the Magistrates' Court, where there is an automatic right of appeal to the Crown Court under s. 108(1) Magistrates' Courts Act 1980 and s. 48 Senior Courts Act 1981, apart from other ways of challenging the verdict to the High Court by way of case stated or judicial review – see Hungerford-Welch, *Criminal Procedure and Sentencing*, 7th ed., 2008 (hereinafter Hungerford-Welch), 377 ff. and Pt. 63 of the Criminal Procedure Rules 2010.

[7] § 313 – This provision, which was introduced as a measure of easing the docket overload and consequent backlog in the lower courts by the *Gesetz zur Entlastung der Rechtspflege*, i.e. the Administration of Justice (Reduction of Workload) Act, of 1993, allows the appellate court to dismiss an appeal without a hearing if either the defendant appeals against a fine or a warning of a fine of not more than 15 daily units (see §§ 40, 59 StGB) or a summary fine (*Geldbuße*), or the prosecution appeals against an acquittal or closure of the proceedings and they had not asked for a fine of more than 30 daily units, if the appeal is obviously unfounded. § 313(2), however, makes it clear that this is not an additional requirement for an appeal because the "leave" must be granted *unless* the appeal is obviously without merit, in which case it shall be dismissed by written procedure as *unzulässig* i.e. inadmissible. In other words, the law does not introduce a leave requirement but merely allows to court to dispose of the appeal based on its paper form, and to dispense with a hearing. This provision was politically motivated based on budgetary and staffing constraints in the judiciary, is widely regarded as a systemic artefact and as probably inapplicable in juvenile proceedings. It has the clear potential for misuse by both judges and prosecutors by encouraging them to dispose of a case, for example, by reducing the number of daily units and increasing the amount of the daily unit instead, because the latter is not a criterion for § 313. – See Lutz Meyer-Goßner, *Strafprozessordnung*, 53rd ed. (2010) (hereinafter MG) § 313 marginal no. (hereinafter Mn.) 2 with further references.

[8] See the *Green Paper of the European Commission on the Presumption of Innocence* - COMM (2006) 174 final - and the replies by individual countries and organisations, all available at http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/news_contributions_presumption_of_innocence_en.htm, especially Question 8 on the duration of the presumption where the following picture emerged: There is a clear split between the civil law and common law countries in Europe. The former all put the emphasis on the final i.e. unappealable judgment (answers received from Germany, Austria, Czech Republic, France, Hungary, Italy, Poland, Slovakia, Turkey [answer not fully clear]). The following organisations replied in the same vein: Amnesty International, Deutscher Anwaltverein, Bundesrechtsanwaltskammer, Centro Studi di Diritto Penale, European Judicial Network. The only answers that chose the first

become final until there is no more chance of an appeal. The standard of proof required in § 261 for conviction, the "free conviction" (*freie Überzeugung*) does in effect mean exactly the same thing as the reasonable doubt standard, because the judge must be convinced of the facts as supported by the evidence to a degree that "reasonable and not merely theoretical doubts are excluded"[9]. In addition, the judge must set out her reasons for her persuasion in the judgment, something an English jury does not do and an English appellate court could thus in effect be said to be merely making an educated guess about whether the jury verdict is unsafe, based on the directions of the judge and his overall handling of the trial. The reasons are susceptible to full appellate review against the parameters laid down in the law, a degree of protection against judicial arbitrariness which is arguably higher than in English law. In sum, this short overview of some of the features of German procedural law should have shown that we better be wary of attaching significant substantial connotations to mere terminological usage and should abstain from generalisations.

The Applicable Law[10]

German criminal[11] procedure is determined by a number of legal sources mainly on the federal level, much like the substantive law, and the same hierarchy of norms as well as rules of interpretation apply.[12] The main

conviction as the critical point were those from Ireland and the Bar Council of England and Wales; they did, however, point out that the presumption is revived once a conviction is quashed. The Bar Council expressly emphasised that this position is intricately linked to the fact that there is no automatic right of appeal from a conviction in the Crown Court, but only with leave of the latter or the Court of Appeal. The impact of the domestic appeals model on the operational scope of Article 6(2) is clearly brought out, for example, in the case of *Callaghan v. UK*, European Commission of Human Rights, Decision of 9 May 1989, Application no. 14739/89.

[9] Consistent jurisprudence of the *Bundesgerichtshof* (BGH) and the lower courts, see BGH NStZ 1988, 236; NStZ-RR 2010, 85; *Oberlandesgericht* (OLG) Karlsruhe, NStZ-RR 2007, 90 and further references at MG § 261 Mn. 2.

[10] All the laws mentioned in this paper and a number of translations into English of the main acts of legislation in the form of their most recent amendments can be found on the official website of the *Bundesministerium der Justiz*, the Federal Ministry of Justice, at www.gesetze-im-internet.de, the latter under the tab "Translations". The translations used in this paper are taken from that website and have been modified by the author when necessary.

[11] This paper will only look at criminal proceedings proper, not at the administrative sanctions under the *Ordnungswidrigkeitengesetz* -OWiG, because those are no longer considered criminal sanctions. See for the OWiG the commentary by Erich Göhler/Franz Gürtler/Helmut Seitz, *Gesetz über Ordnungswidrigkeiten – OWiG*, 15th ed., 2009.

[12] See my *Principles of German Criminal Law*, 2009 (hereinafter POGCL), 10 ff, to which the reader is referred for the details.

sources that we will be looking at are, after the international and European Union[13] levels of legislation, the following laws:

- *Grundgesetz – GG*: The Basic Law or German Federal Constitution, which lays the foundation for issues such as judicial independence and civil liberties. The constitutions of the individual member states of the Federation can also have an impact on the application of the federal law, although the general rule is that the lowest rank of federal law breaks state constitutional law, Art. 31 GG.[14]
- *European Convention on Human Rights*: Directly applicable in German law, has the same functions as the Human Rights Act 1998 in the UK.
- *Strafprozessordnung – StPO*: The Code of Criminal Procedure which contains the majority of the law related to the conduct of criminal proceedings against adults.
- *Jugendgerichtsgesetz – JGG*: Juvenile Courts Act, which regulates the specific features of proceedings and sentences against juveniles (14 – 18 years of age) and young adults (18 – 21 years of age). It is noteworthy in this context that the criminal law is not fully congruent with the civil law on the consequences of coming of age at 18: The civil law attaches the full canon of rights and duties once a person reaches that age. There is no separate treatment for the group between 18 and 21; the latter had for many years been the age of majority in Germany. However, the juvenile law operates, not uncontroversially, on the common sense experience that (a) many people under 21 are still in the developmental stages of a juvenile or that (b) the offence sometimes carries a distinctly juvenile character, and that they should consequently be given some leniency and be educated rather than punished[15]. This has the consequence that adult

[13] European law has so far impacted mostly on the areas of international cooperation in prosecution and enforcement, for example, through instruments such as the European Arrest Warrant, the European Evidence Warrant, the Framework Decision on financial penalties etc. For the German view on these developments and the German implementing legislation see Wolfgang Schomburg/Otto Lagodny et al., *Internationale Rechtshilfe in Strafsachen*, 5th ed., forthcoming 2011.

[14] A famous and highly controversial case on this issue was the trial of Erich Honecker, the former Chair of the Politbüro and Head of the Council of State (*Staatsratsvorsitzender*) of the now defunct German Democratic Republic, whose trial was stopped because of a procedural bar pursuant to § 206a under recourse to the constitution of the Land Berlin, because he was terminally ill and therefore being put on trial violated his human dignity according to the Berlin, not the federal, constitution. See *Berliner Verfassungsgerichtshof* (BerlVerfGH) NJW 1993, 515 and the critical literature voices listed at MG § 112 Mn. 11a; more generally on the matter see BVerfGE 96, 345; 103, 332.

[15] However, there is potential for abuse as well which is borne out by the previous practice in many courts to use adult law for traffic offences by young adults, because

criminal law will normally apply to 18-year-olds unless one of the two conditions just mentioned is made out.

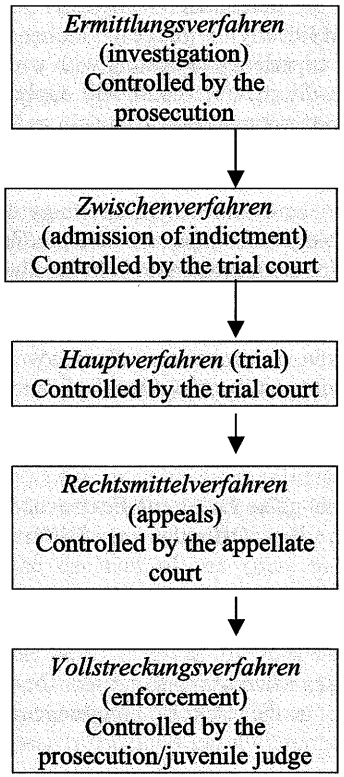
- *Strafgesetzbuch – StGB*: The Criminal Code makes provision for the bulk of the sentencing law and for prerequisites to prosecution such as requests to prosecute and limitation periods etc.
- *Gerichtsverfassungsgesetz – GVG* - and *Einführungsgesetz zum Gerichtsverfassungsgesetz – EGGVG*: Courts Organisation Act and its Introductory Act containing basic rules on jurisdiction, composition of courts, open justice etc.

There are further secondary pieces of legislation that exist now on the *Länder* i.e. member state level after the 2006 Federalism Reform, namely the law on the conditions of the detention on remand in criminal proceedings, the *Untersuchungshaftvollzug*, and the law on conditions of imprisonment, the *Strafvollzug*. Both of these were previously regulated by federal laws but have now been devolved into the domain of the individual *Länder*; at the time of writing not all of them had passed their own state legislation but a number still applied the old federal law as *Land* law for the time being. There are furthermore two sets of regulations that are important for the administrative side of the work mainly of the prosecution, the so-called *Richtlinien für das Straf- und Bußgeldverfahren – RiStBV* – i.e. the Guidelines for Criminal and Administrative Summary Fine Proceedings, and the *Anordnung über Mitteilungen in Strafsachen –MiStra* – i.e. the Criminal Proceedings (Transmission of Information) Ordinance. Both can be compared to a kind of statutory instruments and were passed by the governments of the *Bund* and the *Länder*. The law on criminal records is regulated by the *Bundeszentralregistergesetz* (Federal Central Criminal Register Act).

these offences are typically sanctioned in written proceedings, the so-called *Strafbefehlsverfahren*. This procedure is neither available against juveniles (§ 79(1) JGG) nor against young adults if juvenile law is applied (§ 109(2) 1st sentence JGG). Because of the mass of such cases many judges had resorted to a rather looser appreciation of the developmental stage of the defendant in order to clear their docket.

The Stages of Procedure

It is important to have a general grasp of the structure of the normal procedure in German criminal law, leaving aside some special procedures which we cannot look at here for reasons of space. The normal flowchart of a case is as follows, in a very simplified manner:



Within each of those stages, there are, of course, numerous fields of interaction between the prosecution and the courts, for example, in the investigation stage the prosecution may have to apply for arrest, search and seizure, phone-tapping warrants etc., at trial it is within the discretion of the prosecution whether to extend an indictment to facts newly discovered during an ongoing trial under § 266 or to opt for a separate trial, and in the enforcement stage it may have to present the dossier to the court for decisions about early release etc.

Juvenile Courts

We have already seen that there exist specific regulations for the proceedings against juveniles and young adults under the JGG, which are to be conducted from the investigative stage with special reference to educating the defendants, and not merely with a view to punishment (§ 2 JGG). The general provisions of the StGB and StPO only apply insofar as the JGG does not provide otherwise (§ 2(2) JGG). The most obvious one is that this category of defendant is (usually[16]) tried before special juvenile courts, staffed (ideally) by judges, both lay and professional, and prosecutors who have experience in dealing with young people; it is quite another issue whether the juvenile court will apply substantive juvenile criminal law to cases of young adult offenders as was indicated above. Juvenile courts take precedence over adult courts of the same or lower tiers (§ 47a 1st sentence JGG).[17] Another major feature of the juvenile procedure that has no equivalent in proceedings against adults is the institution of the *Jugendgerichtshilfe*, the Juvenile Court Support Service (§ 38 JGG). This service is an invaluable help for juvenile courts in that it provides information about the defendant's development and in the case of a conviction, acts as a specialist probation service unless the court appoints another person as probation officer. As far as sentencing is concerned, the JGG contains its own arsenal of sanctions geared towards the overall aim of educating rather than punishing the defendants.

Terminological issues – The Different Forms of Decisions, Stages of Legal Examination; the Offender at Different Stages of the Proceedings

Forms of decisions

One difficulty that arises when trying to present the German system to an Anglophone audience is the lack of congruence between procedural

[16] § 103(2) 2nd sentence JGG allows for juveniles, and § 112 1st sentence JGG which refers to §§ 102 -104 JGG for young adults, to be tried exceptionally before certain courts that have specialist jurisdiction over adults if the juveniles/young adults are co-defendants with adult defendants being tried before those courts and trying them together appears advisable in order to establish the truth of the case or for other serious reasons. § 104 JGG orders in those cases that for juveniles a number of provisions from the JGG shall apply before the adult court and leaves it in the discretion of the court to apply others from the JGG; however, § 112 2nd sentence JGG excludes the application of the provisions referred to in § 104 JGG in the case of young adults insofar as they would not ordinarily apply to young adults.

[17] The only exception are the specialist courts mentioned in the previous footnote, see § 47a 2nd sentence JGG which refers to § 103(2) 2nd and 3rd sentences JGG; the latter states that these courts take precedence even before the juvenile chamber at the *Landgericht* (District Court). See Chapter 3 on jurisdiction *ratione materiae* in my forthcoming book (fn. 1) for more detail.

concepts. One of those issues is the various forms of decisions and how they are described. In English, we have judgment, decision and order as well as the generic expression of a ruling. A judgment usually closes an instance, for example, after a trial or an appeal, a decision short of judgment may rule on a motion by a party, allowing or denying it, and an order usually expresses a command of the court to the parties or third persons. All of these can also untechnically be called a ruling. German law distinguishes along other lines that are not easily classified: It knows *Urteile*, *Beschlüsse* and *Verfügungen* as well as the specific instrument of the *Strafbefehl*; the generic term for all of these is *Entscheidungen*. *Urteile* come closest to the English judgments in that they are usually meant to close an instance based on a full trial[18]; any other decisions or orders are issued by *Beschluss*. A *Beschluss* does not normally require an oral hearing, but some decisions after an oral hearing are *Beschlüsse*. A *Beschluss* may contain a decision and/or an order within the meaning under English law. However, in some cases, the function of an *Urteil* can be taken by a *Beschluss*, for example, in § 349(2) which allows the appellate court in the *Revision*, i.e. the appeal on points of law, to dismiss an appeal on the merits as obviously unfounded by *Beschluss* or in a case of an obviously founded appeal to quash the lower court's *Urteil* under § 349(4) by unanimous vote; a decision on the merits of an appeal against an *Urteil* usually has to be passed by *Urteil* (see, for example, § 349(5)). The *Strafbefehl*, a decision issued in purely written proceedings and characterised by some commentators as a *Beschluss*[19], can convict and sentence a defendant to a fine or, if he is represented by counsel, even to a suspended term of imprisonment not exceeding one year (§ 407(2) 2nd sentence); yet once it has become final it has the force of an *Urteil* (§ 410(3)). Similarly, the decision of the court to order a provisional discontinuance of the proceedings under a condition in § 153a(2) 1st sentence after an indictment and until the end of the trial (and even of an appeal hearing on the facts) is given by *Beschluss*; if the defendant complies with the condition the discontinuation becomes final and the effects of double jeopardy attach (§ 153a(1) 5th sentence) as they would to an *Urteil*.[20] A *Verfügung* is usually a purely internal decision by a judge or prosecutor, for example, the decision of a prosecutor to indict a defendant or to discontinue the proceedings, the so-called *Abschlussverfügung*.

Why is all this important? Because the form a decision takes decides the manner in which an appeal may be lodged against it: *Urteile* can

[18] MG Einl Mn. 121 ff.

[19] MG Einl Mn. 121.

[20] However, in the case of provisional discontinuances only to the extent that the offence was prosecuted as a *Vergehen* (misdemeanour), not as a *Verbrechen* (felony). For the distinction see POGCL, 27.

typically[21] be attacked through the appellate avenues of *Berufung* (by way of trial de novo) and *Revision* (appeal on points of law only), both of which are time-limited, *Beschlüsse* are typically subject to the *Beschwerde* (which may be time-limited and is then called *sofortige Beschwerde*). *Verfügungen* as mainly internal acts are usually not subject to appeal[22]. Indeed, if the court uses the wrong form, the proper appellate remedy is in principle determined by the form it *should* have taken.[23] For example, if a court decides by *Beschluss* to discontinue a trial for a part of the facts underlying the indictment because in its view the defendant is not guilty of committing an offence based on those facts, the decision is in fact a partial acquittal and is considered to be an *Urteil*.[24] It is thus easy to see that the rhetorical question "What's in a name?" does not apply to (German) legal terminology.

Stages of legal examination

A notable decision from recent British legal history is that of *Blackburn v Attorney-General*[25], in which Mr Albert R. Blackburn filed an action to prevent the UK from joining the Common Market by signing the Treaty of Rome and thus giving up part of its sovereignty. The Court of Appeal, per the then Master of the Rolls, Lord Denning, dismissed the action on

[21] This is, for example, not true of the procedure under the OWiG, where an *Urteil* dismissing an objection to a summary fine as inadmissible is subject to the *Rechtsbeschwerde*, i.e. a *Beschwerde* on points of law only; § 79(1) 1st sentence No. 4 OWiG.

[22] There is a major exception for the most important *Verfügung* of the prosecution, the above-mentioned *Abschlussverfügung* i.e. the decision under § 170 whether to indict or discontinue the proceedings. The decision to indict is not subject to appeal, neither is the trial court's decision to admit the indictment for trial (§ 201(1)), however, the decision not to indict can be reviewed by the so-called *Klageerzwingungsverfahren* under § 172 which consists of a two-tier process, first a request to the senior prosecutor to order his subordinate to indict, and in the case of the former's refusal to do so, an application to the *Oberlandesgericht* to order the prosecution to indict. – There is a more general discussion about whether such *Verfügungen* can be the object of a request for judicial review under § 23 EGGVG if they have some form of *external effect* and may infringe the rights of the defendant or other parties and much here is still controversial; see the commentary in MG § 23 EGGVG.

[23] MG Einl Mn. 122. – The ensuing question of how to treat an appeal that takes the right form for the decision as it *has* been issued, but not for the form in which it *should have been* issued, is usually solved by the application of the *Meistbegünstigungsprinzip*, i.e. the principle of providing maximum effect to a party's procedural declarations if the error is the court's rather than the party's; see BGH MDR 2009, 1000.

[24] BGH JZ 1963, 714; see also BGHSt 15, 259. – This must be distinguished from the situation under § 300 which requires the court to interpret a declaration by the defendant aimed at reviewing a ruling in a manner to give it maximum effect as the proper remedy, i.e. if someone wrongly files a *Beschwerde* against an *Urteil*, the court must interpret this as either a *Berufung* or a *Revision*. The two scenarios may, of course, overlap; see *Karslruher Kommentar zur Strafprozessordnung*, 6th ed., 2008 (hereinafter KK)-*Paul* § 300 Mn. 1 – 3.

[25] [1971] EWCA Civ 7.

the merits. During the proceedings the question arose whether the plaintiff actually had standing to bring such an action, an issue which Lord Denning and with him the entire panel answered as follows:

> A point was raised as to whether Mr. Blackburn has any standing to come before the Court. That is not a matter upon which we need rule upon today. He says that he feels very strongly and that it is a matter in which many persons in this country are concerned. I would not myself rule him out on the ground that he has no standing. But I do rule him out on the ground that these Courts will not impugn the treaty-making power of Her Majesty, and on the ground that insofar as Parliament enacts legislation, we will deal with that legislation as and when it arises.[26]

This approach, which matches what another common law judge, David Hunt, said about the function of procedural rules in the context of the international criminal justice system[27], would be *anathema* to a German judge. German law, not that different from English law on this issue in principle, knows of the distinction of whether an application, request, action, appeal etc. is admissible (*zulässig*) or inadmissible (*unzulässig*), or whether it is well-founded on the merits (*begründet*) or not (*unbegründet*).[28] However, where an English judge such as Lord Denning might view it as an expression of pettiness to stop a case, especially one as important as the Blackburn litigation, on a technicality such as standing (*locus standi*), that is exactly what any German judge would do regardless of the nature of the case. The rationale is, on the one hand, that the courts can only exercise their powers to the extent that the constitution and the laws made by Parliament allow them to do so, and laws setting out formalities in the judicial process count among them. German law, and with it many continental legal systems, does not subscribe to the concept of an inherent judicial power that is not derived from some external source but emanates from the judicial function *qua natura*.[29] Cases such as, for example, the US Supreme Court decision in *Chambers v NASCO, Inc.*[30] that allow such inherent powers to function even in the face of express legislation have no counterpart in German law. Apart from this purely doctrinal issue, on the other hand, the distinction also has effects in the realm of *res judicata*: If an application, for example, has been rejected as inadmissible it may be repeated once the criteria for admissibility have been complied with; if it is dismissed on the merits the applicant is

[26] Ibid. (fn. 26).

[27] See POGCL, 7 f.

[28] The declaration of an appeal as either *unzulässig* or *unbegründet* also has an effect on the terminology of the decision dismissing it: Inadmissible appeals are *verworfen*, unfounded appeals are *zurückgewiesen*; see, for example, §§ 346(1), 349(1).

[29] See Michael Bohlander, International Criminal Tribunals and their Power to Punish Contempt and False Testimony (2001) Criminal Law Forum, 91.

[30] See 501 U.S. 32 (1991).

excluded from proceeding with a fresh application based on the same facts.

The position of the offender at different stages in the proccedings

Depending on the stage at which a (potential) offender finds himself in the process, he is given a different name. Before the prosecution indicts a person, he is called the *Beschuldigte*. After indictment, but before admission of the indictment, he is called the *Angeschuldigte*, and after the admission of the indictment, his name is the *Angeklagte*.[31] The use of the terms is apparent from the provisions of the StPO in the different stages of the proceedings. The translation is relatively straightforward without causing too much potential for confusion: *Beschuldigter* is translated by "suspect", *Angeschuldigter* by "accused" and *Angeklagter* by "defendant".[32]

The Major Procedural Maxims – An Overview

Every legal system is driven by some axiomatic principles or maxims that determine its overall shape, the practice of the courts and the academic treatment of problematic scenarios. It will be helpful for the reader to have an outline of a number of rules that make up the character of German criminal procedure; they are not exhaustive but represent the main facets required to understand the ensuing discussion. One can loosely categorise them as constitutional principles that have found a specific outlet in criminal procedure, and as systemic procedural principles, but there is a certain conceptual overlap between both categories.[33]

Constitutional Principles

Judicial independence

This is an obvious feature to which almost all countries of this world subscribe, at least on the paper of their constitutions. In Germany, it was

[31] Note, however, that an offender who is not indicted but against whom a procedure with the aim of sequestering him in a mental health institution or in custodial addiction therapy is instituted (*Sicherungsverfahren*, §§ 413 – 416; *Unterbringungssachen*, § 171a GVG) is always called the *Beschuldigte*.

[32] Note, however, that international criminal courts tend to call the offender the "accused" after indictment.

[33] So, for example, the overview in KK-Pfeiffer/Hannich Einleitung Parts II. and III.

historically introduced in order to block attempts by the monarch[34] at interfering with the judicial sphere[35] (so-called *Kabinettsjustiz* – cabinet justice) and is not to be understood as a privilege of the judiciary.[36] Its aim is to protect the judiciary from outside interference and to make it subject only to the law. It has two facets, personal independence (*persönliche Unabhängigkeit*) and independence in judicial decision-making (*sachliche Unabhängigkeit*). The latter has been enshrined in the constitution in Art. 97(1) GG:

> Judges shall be independent and subject only to the law.

A major facet of this rule is that German judges are not bound by precedent; there is no *stare decisis* doctrine and any judge at an *Amtsgericht* (AG) may deviate from the consistent jursiprudence of the BGH and even of the Federal Constitutional Court, unless the latter's decision has the force of an Act of Parliament under § 31 BVerfGG. A binding effect exists only in an individual case along the avenues of appeal.[37] This applies equally to professional and lay judges.

Because independence in decision-making realistically depends on not having to worry about the consequences of one's decisions, Art. 97(2) GG provides corresponding protection to professional judges:

> Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

A corollary to protecting judicial independence against personal bias are the provisions on recusal in §§ 22 – 31. Furthermore, the German

[34] In recent times such interference has been replaced by that of the Government; see for recent attempts in Germany Michael Bohlander, Flexible Judges or Flexing the Political Muscle? in Leny De Groot-van Leeuwen/Wannes Rombouts (eds.) *Separation of Powers in Theory and Practice - An International Perspective*, 2010, 123.

[35] KK-Pfeiffer/Hannich Einleitung Mn. 24.

[36] BGH NStZ 2001, 651.

[37] Not even the decisions of the Great Senates or the Joint Great Senates of the BGH under § 132 GVG (MG § 132 GVG Mn. 18 – 20) or those of the Joint Senate of the Federal Supreme Courts under Art. 95(3) GG and the *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes* of 19 June 1968 (BGBl. I (1968), 661 as amended by BGBl. I (2001), 1510), i.e. the Federal Supreme Courts (Uniformity of Jurisprudence) Act, are binding on any court but the ones in the individual case; see § 16 of the 1968 Act. – Online at: www.gesetze-im-internet.de/bundesrecht/ spreinhg/gesamt.pdf.

understanding of independence has a direct impact on the professional evaluation of judges, for example, for the purposes of granting them life tenure or promotion: Any comments that touch upon, however slightly, the actual work of a judge, his legal views and practice, his reversal rate by the appellate courts etc. are highly problematic and can be questioned before the administrative courts and the special judicial disciplinary tribunal, the *Richterdienstgericht*.[38] The position of the judiciary has been set out in the *Deutsches Richtergesetz* – DRiG – (German Judiciary Act) which contains regulations for the federal judiciary and certain framework rules for all judges, and the corresponding state laws enacted in pursuance of Art. 98(3) GG for the state judiciaries.

The right to a predetermined judge (Gesetzlicher Richter)

Judicial business needs to be allocated in a fashion that excludes to the greatest extent possible any kind of horse-trading as to who sits on which case. It is obvious that a party may have a strong interest in getting a judge they know is favourably disposed towards their position. Likewise, scenes sometimes seen in American courtroom movies where one judge offers to take a case off a colleague because the latter wants to go on vacation or attend a conference etc. can give rise to additional concerns about judicial docket-swapping. The German constitution outlaws both scenarios in Art. 101(1) 2nd sentence GG:

> No one may be removed from the jurisdiction of his lawful judge.

This has traditionally been held to mean that the methods of case assignment (*Geschäftsverteilung* – see for more detail on the procedure §§ 21a – 21j GVG) in any individual courts must be so exact and comprehensive as to ensure that any case finds its way to the proper judge "blindly".[39] To this end, courts must draw up annual case allocation plans (*Geschäftsverteilungspläne*) which may run into dozens or hundreds of pages depending on the size of the court[40]. They must consider any eventuality, for example, who takes over if a judge falls ill for a longer period of time. These plans are public record and can be – and regularly are – inspected by defence counsel to prepare motions for a change in the panel. If accompanied by a certain degree of arbitrariness as opposed to a genuine error by the court, their violation can also have an effect on an appeal based on the unlawful composition of the panel under § 338 No.1

[38] BGHZ 100, 271 and with further references KK-Pfeiffer/Hannich Einleitung Mn. 24.
[39] BVerfGE 40, 356; 95, 322.
[40] The 2010 case assignment plan for the Landgericht Berlin, for example, has 147 pages and can be accessed at: www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gerichte/landgericht/gvpl_2010_08_16.pdf?download.html.

and may result in the reversal of *Urteile* by courts that have assumed jurisdiction by grossly neglecting the statutory rules on jurisdiction.[41] This restriction must be seen in connection with §§ 20 StPO and 22d GVG which state that the mere fact that a court has no jurisdiction *ratione loci*[42] or that a judge decided a matter who was not meant to do so under a valid[43] case allocation plan does not make their actions invalid[44], unless the violation obviously and glaringly violated the rules on jurisdiction.[45]

The right to be heard (Rechtliches Gehör)

Art. 103(1) GG states:

> In the courts every person shall be entitled to a hearing in accordance with the law.

This means on the one hand that every person must get a chance to state their views in judicial proceedings, orally or in writing, and that any decision taken without affording them such an opportunity runs the risk of being quashed as unconstitutional. On the other hand it entails the duty of the court to advise the parties of any legal points it intends to base its decision upon if these are so far outside of what can be expected by a well-informed and diligent party that it would amount to a trial by ambush by the court.[46] The decision of the court must show that it engaged with the relevant[47] arguments put forward by a party; if this is not the case the decision may violate Art. 103(1) GG and be reversed.[48] Similarly, courts must not use facts known to them but not to the defendant in order to arrive at a decision that is to his disadvantage, an issue particularly relevant in proceedings for terrorism and organised crime.[49] If a judge in a certain case indicates, for fear or existence of bias or based on an exclusion by law, through a statement to the other judges of his chamber or another judge in charge of recusal matters, that he may be prevented from sitting on that case, his statement must be disclosed to the parties so they can comment upon it.[50] This constitutional right has

[41] See BGHSt 38, 212 and KK-Pfeiffer/Hannich Einleitung Mn. 25.
[42] The principle does not apply to violations of the rules on jurisdiction *ratione materiae* other than case allocation plans; OLG Köln StV 2004, 417.
[43] The rule does not apply to allocation plans that are legally flawed; MG § 22d GVG Mn. 1.
[44] MG § 20 Mn. 1 – 3; § 22d GVG Mn. 1.
[45] MG § 20 Mn. 1.
[46] BVerfGE 84, 188.
[47] Although not necessarily each and every one even if they are abstruse and entirely off the mark: BVerfGE 47, 182.
[48] BVerfGE 51, 129; NJW 1992, 2877.
[49] BVerfGE 63, 45.
[50] BVerfGE 89, 28.

been taken up in many provisions of the StPO, such as §§ 33, 230, 243(4), 257, 258 etc.

The right to a fair trial

This right, which covers many different aspects of criminal proceedings and is in a way the basic right underlying almost all others, is guaranteed by Art. 20(3) on the *Rechtsstaat* principle (state based on the rule of law) together with the general personal freedom right in 2(1) GG.[51] Its underlying rationale is to ensure that a person is not made a mere object of the proceedings but retains a way of engaging actively in them.[52] For Germany, the right has been given concrete shape in the StPO and the corresponding parliamentary legislation, including the ECHR and mainly its Art. 6. In practice, the right has been held to constitute a rule of interpretation to be applied by the courts to the existing law rather than a vehicle of creating new legal interests; in a democracy it should be used with great care because it is primarily for the democratically elected legislature to flesh out such general principles and there may be several equally acceptable ways of reaching that goal.[53] Violations of the right to a fair trial do not necessarily lead to a procedural bar, but may have the consequence of a substantial reduction in sentence, as, for example, in the case of the prosecution reneging on an assurance not to prosecute[54] or in the well-known scenario of entrapment by undercover *agents provocateurs*.[55] The principle also has had a major effect in the context of plea bargaining, which after a long period of being based purely on case law was finally codified in § 257c.[56] Another important area of application is the right to the assistance of counsel[57] and to legal representation on the basis of free legal aid in the case of indigent persons.[58]

[51] BVerfGE 77, 65.
[52] BVerfGE 63, 45. – See also from a literary point of view the famous work by Franz Kafka, *The Trial*. Kafka describes the experiences of Josef K. who wakes up one morning and finds himself under arrest for a crime he did not commit and the nature of which is never revealed to him during the entire – and bizarre – proceedings.
[53] BGHSt 24, 124; 49, 112; NStZ 1984, 274; BVerfGE 57, 250.
[54] BGHSt 37, 10.
[55] BGHSt 45, 321; 47, 44 and see now the regulation of the conditions for their use in §§ 110a – 110c.
[56] Note, however, that § 257c(2) 3rd sentence clearly states that there must be no charge bargaining and that measures of rehabilitation and incapacitation (§§ 61 – 72 StGB) cannot be made the object of a bargain.
[57] BVerfGE 38, 105.
[58] BVerfGE 46, 202; 56, 185.

The presumption of innocence (Unschuldsvermutung)

As already indicated above, this is one of the foundation pillars of any criminal justice system worthy of the name. It is also based on the *Rechtsstaat* concept and thus has constitutional rank, despite the fact that it also applies on the level of simple federal law through Art. 6(2) ECHR. The Federal Constitutional Court has developed a practice of using the ECHR to interpret the German domestic constitutional concept of the presumption of innocence based on the specific significance of the Convention for the relationship between its human rights and the German constitution's civil liberties (*Grundrechte*).[59] The presumption has a connection to the principle *in dubio pro reo*, yet there are slight differences in that the *in dubio* rule is triggered only *after* the court has evaluated all the available evidence before it and must then weigh any gaps in favour of the suspect, accused or defendant, whereas the presumption in German understanding applies irrespectively of that at all stages of the proceedings until the conviction has become final through exhaustion of the entire appeals process.[60] Equally, a defendant is not required to prove, for example, an alibi but she may do so and a failure to prove it does not automatically mean that she is guilty.[61] In other words, the absence of exculpating evidence is not equal to the presence of incriminating evidence.[62] However, the presumption naturally does not prevent measures such as arrest, search and seizure etc. which merely require a certain degree of *suspicion* instead of certainty.[63]

The principle of proportionality (Grundsatz der Verhältnismäßigkeit and Übermaßverbot)

Also derived from the *Rechtsstaat* principle in Art. 20(3) GG, this principle states that any intrusion by the state into the rights of an individual must only use the least burdensome means necessary to achieve a legitimate objective and that the individual must be overall subject to a legitimate expectation to suffer the intrusion even if it is of such a character (*Zumutbarkeit*).[64] Like the right to a fair trial this rule has been broken down into specific provisions related to the different stages of the proceedings, such as the taking of (intimate) samples from the suspect, arrest and detention, and similar sentiments as above apply. In

[59] BVerfGE 74, 358.
[60] BVerfGE 32, 202; BGH NStZ 1999, 205; KK-Pfeiffer/Hannich Einleitung Mn. 32a.
[61] Example used by KK-Pfeiffer/Hannich Einleitung Mn. 32a.
[62] BGHSt 41, 153.
[63] BVerfG NJW 1990, 2741. – For the problem of whether the defendant can be burdened with his own expenses in the case of a discontinuance (he can) see KK-Pfeiffer/Hannich, Einleitung Mn. 32a with further references.
[64] Consistent jurisprudence of the Federal Constitutional Court: BVerfGE 17, 108; 20, 162; 35, 382; 37, 167; 44, 353; 67, 157; 110, 226.

practice, proportionality will often be determined by the seriousness of the charge and the strength of evidence underlying the suspicion at any given time. However, even a charge of murder or of other serious offences in and of itself is, for example, not a sufficient reason to remand a suspect in custody pending trial if none of the usual reasons for denying bail exist: The introduction of the provision of § 112(3) which did away with the requirement to establish a risk of flight or tampering with evidence etc. in cases of serious crime in order to detain a suspect was held to be unconstitutional qua lack of proportionality if literally applied and was consequently read down by the Federal Constitutional Court to include such a requirement, although it conceded that in cases of such serious offences the degree of justification in an arrest warrant was for obvious reasons not as high as that for medium level crime under the usual criteria.[65] In fact, in many cases an arrest warrant may be based on flight risk because of the severe punishment the suspect can expect and the court may thus circumvent the problems of subsection (3).[66]

The judicial duty of care (Gerichtliche Fürsorgepflicht)

This is a kind of ancillary duty based on a variety of constitutional axiomata such as the right to a fair trial and the principle of a socially oriented state based on the rule of law (*sozialer Rechtsstaat*) (Arts. 20(1), 28 GG). It supplements the right to a fair trial in asking judges to assist especially undefended and inexperienced pro-se defendants in the proper exercise of their rights, and to abstain from exploiting their position by asking them, for example, to declare a waiver of appeal by telling them that they got away with a black eye etc., with the judge thus avoiding the need for a fully reasoned *Urteil.*[67] It may also mean re-opening the hearing if a co-defendant makes an unexpected confession in his last word (§ 258(2)) before judgment is pronounced to allow the other co-defendant(s) to react to this and consult with their counsel.[68] Other cases include the court looking for a therapy placement for a drug addict who is willing to go into therapy[69] or making the best effort to arrange a hearing date at which counsel of the defendant's trust can attend.[70] Finally, the duty of care also covers third persons such as witnesses in need of support.[71]

[65] BVerfGE 19, 342.
[66] MG § 112 Mn. 37 – 39.
[67] KK-Pfeiffer/Hannich Einleitung Mn. 32.
[68] See the decision by the BGH of 11 June 1975, Docket No. 2 StR 88/75.
[69] BGH NJW 1991, 3289.
[70] BGH NJW 1992, 849.
[71] BGH NStZ 1984, 31.

Ne bis in idem – Strafklageverbrauch

A feature of most modern criminal justice systems is the rule that a person should not be prosecuted or tried twice for the same[72] offence[73]. In its proper meaning, the principle refers to successive prosecutions, not to simultaneous prosecution under multiple legal characterisations of the same conduct[74]. In German law, the *ne bis in idem* rule, also called the ban on double jeopardy or *autrefois convict or aqcuit* (*Strafklageverbrauch*), is a constitutional fundamental right[75] intricately connected to the finality of a decision (*formelle Rechtskraft*) and the ensuing effect of *res judicata* (*materielle Rechtskraft*): Unless a decision is final, *res judicata* is not triggered[76]. Note that only the operative parts of the decision partake of that effect, not the reasons of a judgment; for example, another judge, be it in civil or criminal proceedings, is free to deviate from the views of the previous court on the facts recorded therein as established, unless the law expressly states otherwise[77]. Of course, the facts in the decision related to the time and place and *modus operandi* of the offence determine which conduct is blocked from a new prosecution under a different legal characterisation; the German law attaches *ne bis in idem* to the same *facts*, not their legal characterisation. Note that only a decision on the merits[78] blocks a new prosecution, not one based on procedural matters; if the procedural obstacle is removed, re-prosecution is possible[79]. The ban is not triggered by decisions of foreign courts,

[72] A conviction or acquittal for a summary offence (*Ordnungswidrigkeit*) also triggers *ne bis in idem* for a re-prosecution as a criminal offence and vice-versa; § 84 OWiG. Note that a sanction for a disciplinary offence does not bar a prosecution for a connected criminal offence based on the same conduct, but that an acquittal from a criminal charge blocks a disciplinary sanction unless there is another aspect to the conduct that is distinguishable from the criminal charge; there may, however, have to be credit given in the sentencing decision. See MG Einl Mn. 178 – 179.
[73] See for the restricted application of the principle in the international and transnational context Michael Bohlander, Ne bis in idem, in Cherif M. Bassiouni (ed.) *International Criminal Law*, Vol. III, 3rd ed., 2008, 541.
[74] There was initially some confusion about this in international criminal law; ibid. (fn. 74).
[75] BVerfGE 9, 89; 23, 191.
[76] MG Einl Mn. 168. – However, while a case is pending before one court, the procedural bar of *litis pendens* (*Rechtshängigkeit*) exists, which prevents another court from dealing with the case; see MG Einl Mn 145.
[77] MG Einl Mn. 170 with references to the case law. One example is § 190 2nd sentence StGB on proof of truth by judgment in cases of libel, where the libel consists of the allegation that the libelled person had committed an offence: If the libel victim had been finally acquitted of the alleged offence before the allegation was made, the defendant can no longer adduce evidence to prove that the allegation was true nonetheless.
[78] Specific problems exist with regard to the extent of the bar in cases of continuous or serial offences (*Dauerdelikte* and *fortgesetzte Handlung*) where individual acts may be prosecuted before the overall pattern becomes known and vice-versa; see on the complex issue MG Einl Mn. 175 – 175a.
[79] MG Einl Mn. 172 with references.

unless there is a duty to take them into account under international or bilateral agreements[80].

Systemic Principles

Accusatory Principle (Anklagegrundsatz)

This principle states the simple fact that under German law a court cannot seize itself of a matter unless an external prosecution, request etc. is brought. This applies, with the exception of minor contempt issues[81], even if a serious offence is committed in front of the judge in a sitting.[82] The prosecution must file an indictment under § 151 before a court can proceed to a trial; the court is under a duty to check at all stages of the proceedings whether a proper indictment exists.[83] The indictment determines the ambit of the court's examination, as is evidenced by §§ 155(1), 264 – 266. The procedure under § 172 described above[84] is not an exception but merely serves as a check on the prosecution's quasi-monopoly[85] to indict persons before the courts.[86]

Principle of public prosecution (Offizialprinzip)

As a corollary to the accusatory principle, the *Offizialprinzip* puts the power to prosecute and indict in the hands of the public prosecution service which has to prosecute without having to abide by the wishes of the victim. There is thus no automatism in Germany that a prosecution will not ensue if the victim does not "press charges", as the reader may have seen many times especially in American films. There are a few exceptions that mainly deal with minor offences where the victim (a) must either formally request prosecution, the so-called *Antragsdelikte*[87], or (b) may prosecute the offence herself (§ 374 - *Privatklage*)[88], or (c)

[80] MG Einl Mn. 177 – 177c.
[81] See §§ 176 – 178 GVG.
[82] She will have to refer the case to the prosecution under § 183 GVG, after recording what happened and, if need be, arresting the offender provisionally under §§ 127, 128 – she cannot, however, issue an arrest warrant based on § 112 because she lacks jurisdiction for that; see OLG Hamm NJW 1949, 191; MG § 183 GVG Mn. 1 – 2.
[83] BGHSt 5, 225.
[84] Fn. 23.
[85] Leaving aside the institution of the *Privatklage* (private prosecution) for minor offences under §§ 374 – 394.
[86] KK-Pfeiffer/Hannich Einleitung Mn. 3.
[87] For example, minor cases of trespass, insults etc. See KK-Pfeiffer/Hannich Einleitung Mn. 4 for further examples.
[88] The prosecution may, however, at any stage of the proceedings join the private prosecutor or take over the case completely (§ 377). If it does take it over, which it will normally only do if it is in the public interest (see § 376), the proceedings change their nature and transmogrify into normal proceedings as if upon indictment, with the consequence that the private prosecutor is no longer a party to them unless he joins the prosecution as a *Nebenkläger* under the criteria set out in §§ 395 – 402. This also means that the prosecution and the court can discontinue the proceedings under §§ 153 ff without the consent of the prior private prosecutor or the *Nebenkläger*; the *Nebenkläger* must, however, be heard before a discontinuance is issued which is why a court intending to discontinue the proceedings under §§ 153(2), 153(a)(2), 153b(2) and 154(2) must first decide whether a person is allowed to join the prosecution and hear them before ordering the discontinuance; MG § 396 Mn. 18.

where certain persons such as civil service superiors and line managers, political organs, foreign States etc. have the discretion to request prosecution or not (so-called *Ermächtigungsdelikte*).[89]

Principles of mandatory and discretionary prosecution (Legalitätsprinzip and Opportunitätsprinzip)

The monopoly given to the prosecution to decide whom to prosecute requires a corrective mechanism to ensure that there are no arbitrary choices being made. This is established in § 152(2) which requires the prosecution in principle to investigate, prosecute and indict any offence for which sufficient evidence exists. German doctrine therefore takes the opposite approach from that of England and Wales, famously expressed in 1951 by the former Attorney-General Sir Hartley Shawcross who stated that "[i]t has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution". He added that a prosecution should occur "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest".[90] However, as with so many things doctrinal, theory and practice are two different things. In England and Wales, the institution of private prosecution exists as it does in Germany (although in a somewhat different form), and it is subject to similar checks by requiring the consent of the DPP for some offences and empowering the DPP to take over any criminal proceedings and, if necessary, discontinue them.[91] The basic rule in Germany has been watered down considerably by the introduction of §§ 153 ff which allow the prosecution and the courts to discontinue proceedings for minor offences if in their discretion it is opportune to stop the case (*Opportunitätsprinzip*) because the guilt of the offender is of a minor nature and/or may be sufficiently sanctioned by way of a conditionial

[89] For examples see See KK-Pfeiffer/Hannich Einleitung Mn. 4.
[90] House of Commons Debates, vol. 483, 29 January 1951.
[91] S. 6 Prosecution of Offences Act 1985; see for further reference Hungerford-Welch, 134 – 136.

discontinuance. The following table[92] shows the actual numbers of how cases are processed in the *Amtsgericht* and *Landgericht* jurisdictions:

Table 1: Cases dealt with by the prosecution service – All of Germany, 2006

Total number of cases	4,876,989	
Indictment	560,427	11,5 %
Strafbefehl	581,713	11,9 %
Conditional discontinuance	241,102	4,9 %
Unconditional discontinuance	1.053,654	21,6 %
Insufficient evidence discontinuance	1,293,152	26,5 %
Death of suspect, lack of responsibility	8,651	0,2 %
Other	1,138, 299	23,3 %

The large category of other disposals included referrals to another prosecution service, to administrative proceedings, juvenile proceedings, provisional discontinuances, joinder with other cases etc. The important information as far as adult proceedings are concerned is that of the purely criminal charges only 23,4 % were actually either indicted formally or by way of a written *Strafbefehl*, with the latter again being applied more often than the formal indictment; one can almost say that the *Strafbefehl* has become a kind of secondary diversion instrument by sparing the accused the spectacle of an open trial unless she objects and chooses to contest it. 26,5 % of cases were dealt with by discontinuances under §§ 153 ff and most of those were unconditional ones. Once a case goes to court, the picture changes somewhat, but there is still a high proportion of discontinuances, as is evidenced by Table 2.[93]

Table 2: Cases dealt with by the courts – All of Germany, 2006

Total number of defendants	976,600	
Urteil (including acquittals)	461,274	47,2 %
Strafbefehl	25,835	2,6 %
Conditional discontinuance	124,083	12,7 %
Unconditional discontinuance	100,994	10,3 %
Other discontinuance/discharge	28,327	2,9 %
Other disposal	236,087	24,2 %

The other discontinuances/discharges included cases of extradition, expulsion, absence of the defendant and procedural bars. The other disposals included combination with another case (119,532), withdrawal

[92] Taken from Jörg-Martin Jehle, *Criminal Justice in Germany*, 5th ed., 2009, 20. – Available on the website of the Federal Ministry of Justice at www.bmj.bund.de/enid/9d342b183e639ed913ef2e1fc5c3c018,0/Publications/Criminal_Justice_in_Germany_19x.html.

[93] Ibid., 26.

of a private prosecution or of an appeal (61,155), referral to another court and refusal by the trial court to admit the indictment for trial. Again, 23% of the cases that had made it to the court were dealt with by a discontinuance under §§ 153 ff. It is thus clear from the statistics that in practice the *Legalitätsprinzip* has already been replaced as the guiding principle. It now merely means that the prosecution has to start an investigation if sufficient facts warrant it, but that a formal prosecution by indictment or *Strafbefehl* occurs only in about a quarter of all cases.

Inquisitorial principle (Ermittlungsgrundsatz)

The major feature that justifies calling Germany an inquisitorial system is the rule that the aim of any investigation and trial is the ascertainment of the material truth (*materielle Wahrheit*), not the truth based on facts adduced by the prosecution and defence. The court is not bound by any declarations of the parties and investigates the facts on its own motion (§§ 155(2) and 244(2)). German procedure is not party-driven, despite the fact that the German term for the prosecution service, *Staatsanwaltschaft*, is somewhat unfortunate in that it means State Attorney Service and could thus lead one to think that the prosecution only represents the one-sided interests of the state as a party. While in practice some prosecutors (and judges) may and do, of course, develop a prosecution-minded attitude[94], the law is opposed to such partisan approaches. The principle applies to the prosecution in the form of § 160(2) which expressly states that the prosecution must equally investigate the incriminating and exculpatory facts of a case, a provision which has led some to call the German prosecution service the "most objective authority in the world" (*objektivste Behörde der Welt*).[95] In the case of a court this can mean, for example, that a judge will order the police or the prosecution to investigate a certain set of facts if they have come up during the

[94] This can take rather extreme forms: A former judicial colleague of mine actually affirmed in a private conversation once that he did not think the police indulge in any sort of misconduct during the investigations.

[95] They make implicit, but questionable reference to a statement by Franz von Liszt made to the Berliner Anwaltsverein on 23 March 1901, when he said, quite to the contrary: "[...] die Parteistellung der Staatsanwaltschaft ist durch unsere Prozeßordnung besonders verdunkelt worden. Durch die Aufstellung des Legalitätsprinzips, durch die dem Staatsanwalt auferlegte Verpflichtung in gleicher Weise Entlastungs- wie Belastungsmomente zu prüfen, könnte ein bloßer Civiljurist [...] zu der Annahme verleitet werden, als wäre die Staatsanwaltschaft nicht Partei, sondern die objektivste Behörde der Welt."; DJZ 1901, 179. As a matter of fact, the powers of the *Staatsanwaltschaft* continued to increase even in 1975 with the removal of the so-called *gerichtliche Voruntersuchung*, i.e. the judicial investigation, and came to be seen – and used – shortly after the time of its introduction in the first half of the 19th century as a medium of political influence by the governments in Prussia and the other German states, in order to counter the inevitable advance of the idea of judicial independence; see Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, 2009, 92 ff.

Zwischen- or *Hauptverfahren* and had not been examined by the prosecution.[96]

Principle of oral presentation of evidence (Mündlichkeitsprinzip)

The court may under this rule only use the evidence for its decision which was orally presented and discussed in the hearing before it. Despite the fact that this principle has not been expressly enunciated in the StPO the courts have consistently interpreted various provisions such as §§ 250, 261, 264 and § 169 GVG that refer to the *Vernehmung* (interrogation) of witnesses or the *Verhandlung* (hearing) as meaning an *oral* hearing.[97] This is also an expression, on the one hand, of the German approach to the concept of open justice, enshrined, for example, in § 169 GVG, which is intended to allow the audience to follow the flow of the evidential presentation and to ensure that the work of the courts is not done away from the eye of public scrutiny, and on the other hand it serves to ensure that the parties to the proceedings know on which pieces of evidence the court will be able to base its decision.[98] The consequence is that, for example, the full text of documents presented in evidence must be read out and not merely be presented as exhibits, unless they are, for example, very lengthy[99] and the procedure under § 249(2) (*Selbstleseverfahren* – private reading procedure) is chosen which allows the judges[100] to take notice of a document by simply reading it, if all the parties have had a chance to read it as well.[101] In such cases, and where the defendant is not put at a disadvantage, the efficiency and expediency of the trial proceedings obviously should be given precedence over the information interest of the public.

[96] KK-Pfeiffer/Hannich Einleitung Mn. 7.
[97] BGH NStZ 1990, 228.
[98] KK-Pfeiffer/Hannich Einleitung Mn. 8.
[99] Possibly even entire books, see BGH NStZ 2000, 307.
[100] Including the lay judges, BGH NStZ 2005, 160.
[101] The German law thus differs substantially, for example, from the Dutch approach, which allows to a larger extent the direct use of pre-trial statements (*processen-verbaal*) made to the police etc. as evidence at trial; see Art. 344 of the *Wetboek van Strafvordering* (Code of Criminal Procedure) and the pertinent commentary in Berend Keulen/Geert Knigge, *Strafprocesrecht*, 12th ed., 2010, 499; but see §§ 420, 411(2) 2nd sentence for the expedited and *Strafbefehl* procedures. – Note also the human rights issue under Art. 6(1) ECHR in the case of lay judges reading potentially incriminating material (essential result of the investigations in the indictment related to a prior co-defendant who had made a confession and referred to that part of the indicment for the content of her confession) in another but related proceeding, which was, however, not submitted in the trial of the present defendant, unless clear measures are taken by the court to ensure that the lay judges are aware of the evidential impact or lack thereof on the trial at hand; see ECtHR, *Elezi v. Germany*, Judgment of 12 June 2008, Application No. 26771/03 (no violation) and BGHSt 43, 360 (no violation).

Presentation of evidence before the deciding judges (Unmittelbarkeitsprinzip)

§§ 240 and 250 together with Article 6(3)(d) ECHR require all evidence to be presented directly to the judges who will decide the case. § 261 further restricts the presentation to the hearing and thus excludes in principle the use of evidence not adduced at the hearing; to this extent there is an overlap with the oral presentation principle. The *Unmittelbarkeitsprinzip* also prohibits the court from delegating the taking of evidence to third persons not involved in the final decision-making process. A court may, in the course of a regular trial[102], thus not instruct another official to visit, for example, a witness living abroad or in hospital in another city and take her statement, and then use the record of that official as evidence, unless the conditions for a so-called *kommissarische Beweisaufnahme* (commissary taking of evidence) under §§ 223 – 225 are fulfilled. These allow for a judge to hear witnesses and experts if for reasons of illness, disability or old age they cannot attend the trial, or to carry out an inspection on behalf of the court. The law distinguishes between the *beauftragter Richter* (commissioned judge) who is always a member of the panel[103] seized[104] of the case, and the *ersuchter Richter* (requested judge) who is usually a judge of another court at the place of residence of the witness or expert, or where the inspection is to be taken. The principle has also been interpreted to support the precedence of personal evidence (witnesses, experts) over documentary evidence and is thus related to the "best evidence rule".[105] Critical problems arise in this context in the course of proceedings involving undercover agents, informers etc. where the government may refuse to allow them to testify and block their evidence under § 96 for reasons of national security or a danger to their life, limb or liberty, and only permits their "handlers" to testify as hearsay evidence.[106]

[102] The rule has been relaxed under § 420 for the expedited procedure under §§ 417 ff and is also applicable to the *Strafbefehl* procedure via § 411(2) 2nd sentence.
[103] A panel sitting with professional and lay judges may commission all the professional judges on the panel; BGH NStZ 1983, 182 and 421.
[104] The BGH has held that the commissioned judge does not actually have to sit on the trial later on if she was commissioned before (see § 63) the trial began; BGHSt 2, 1. This can happen, for example, if the judge is assigned to another docket after the trial court admitted the indictment and she took the evidence, but before the actual trial hearings begin.
[105] BGHSt 15, 253. See on the (critical) reception of the old common law "best evidence rule" in the modern day practice of England and Wales Adrian Keane et al., *The Modern Law of Evidence*, 8th ed., 2010, 27 – 29.
[106] KK-Pfeiffer/Hannich Einleitung Mn. 9.

Concentration and speedy trial principles (Konzentrationsprinzip and Beschleunigungsgrundsatz)

These two principles are closely interrelated and aim at a fast and efficient disposal of a case, in the case of the speedy trial rule most obviously in the interest of the defendant who will want to know as soon as possible his future fate. The concentration principle in particular means that a trial should be managed with as few hearing dates as possible. The law distinguishes in this respect between the *Aussetzung* (decision leading to a full retrial ab initio) and the *Unterbrechung* (adjournment). An adjournment may be ordered for a period of up to three weeks, but for not more than a month[107] between hearings (§ 229(1) and (2)); anything that happened in the trial previously retains is validity. If that period cannot be kept, all previous procedural acts are extinguished and the trial must start again from scratch (§ 229(4) 1st sentence). The temptation to set hearing dates at three-week intervals is countered by the speedy trial rule.[108] The latter has not been specifically codified in the StPO but conceptually supplants several of its provisions and flows from Arts. 5(3) 2nd sentence and 6(1) 1st sentence ECHR as well as the *Rechtsstaat* principle.[109] A speedy trial, apart from serving the interest of the defendant, is also a guarantee for preserving the evidence in its best possible state: The longer a case lasts, the greater the danger of loss of memory by or illness or death of (old) witnesses, or of destruction or deterioration of real evidence such as documents, specimens etc. The determination of an appropriate timeframe can be difficult in the individual case and the mere lapse of time, especially if no blame can be apportioned to the justice system, may be a sentencing factor under § 46 StGB but will not normally give rise to a violation of the speedy trial principle under Convention standards or German law.[110] After the decision of the Great Senate of the BGH of 17 January 2008[111], violations of the speedy trial rule are now sanctioned through the so-called *Vollstreckungslösung* (enforcement solution): The court first determines, in the case of a conviction[112], the appropriate sentence taking into account the length of the proceedings, but without regard to the legal aspect of the violation of the Convention (as had been the case previously), and then declares on the basis of the severity of the

[107] If the trial has already lasted for ten days, and then for each new block of ten days; KK-Pfeiffer/Hannich Einleitung Mn. 10.
[108] BGH NJW 2006, 3077.
[109] BVerfGE 63, 45; NStZ 2006, 680.
[110] See the references in KK-Pfeiffer/Hannich Einleitung Mn. 11.
[111] NJW 2008, 860.
[112] The BGH has held that in cases of an acquittal the provisions of the *Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen* (StrEG), i.e. the Criminal Proceedings (Compensation) Act, do not apply mutatis mutandis; there is thus a tension with the view of the ECtHR who requires some form of compensation for material damage and pain and suffering if a mere statement that the actions of the state violated the Convention is not enough; see MG Art. 6 MRK Mn. 9d with further references, and at 9g for the cases of violations of other conventions or procedural principles.

violation which part of that sentence shall be considered to have been served.[113] This approach avoids the problems caused by the old system with statutory minimum sentences and thus allows for a credit to be given even in cases of a mandatory life sentence.[114]

Free evaluation of evidence (Freie Beweiswürdigung)

Free evaluation of evidence (§ 261) does not mean a judicial free-for-all with respect to what the court makes of the evidence presented before it, but it means freedom from strict rules of evidence. For example, in previous times before the 19th century, the German law operated evidential rules that remind one of those in Islamic Shari'ah: A confession by the defendant provided full proof of the charges against him, as did two witnesses of unimpeachable character. If there was only one witness, the charge was proven only half and the judge was then permitted to proceed to the *peinliche Befragung* (painful interrogation) or in other words, to torture. In the first half of the 19th century these rules were abolished and a system introduced that followed the French principle of the *intime conviction*, as set out, for example, in Art. 342 of the *Code d'instruction criminelle* of 1808.[115] § 261 requires the judge to be convinced of the facts before he proceeds to conviction and sentence. In effect, this is much the same as the judicial instruction in England and Wales to the members of the jury that they "must be sure" that the defendant committed the acts he is charged with before they can find him guilty. The law acknowledges that no human being can have absolute certainty of any fact, not even those she may have witnessed herself. Therefore no merely theoretically possible alternative will prevent a conviction, but only one that is reasonably possible. The German law consequently does not ask the judge for absolute certainty, but for his own conviction based on the laws of logic and the absence of *vernünftige Zweifel*, that is, reasonable doubt[116] - and an adequate description of his argument in the *Urteil*, something not required of English juries, for example.

In dubio pro reo

As we saw above when we looked at the presumption of innocence, the application of this principle requires the existence of a finite amount of

[113] However, the courts advise caution with regard to a too generous application of this rule and require a serious violation in addition to the length of the proceedings; see BGH StV 2008, 633; 2010, 228.
[114] BGH NJW 2006, 1529. – For further explanation see KK-Pfeiffer/Hannich Einleitung Mn. 12 – 13b and MG Art. 6 MRK Mn. 9.
[115] KK-Pfeiffer/Hannich Einleitung Mn. 14.
[116] BGHSt 10, 208; StV 1999, 5; NJW 1999, 1562; NStZ-RR 1999, 332.

evidence: Only when the judge has seen and heard all the evidence in a case will she be able to decide what and whom she can believe. The *in dubio* rule is about the factual basis for the *guilt* of the defendant, it does therefore *not* apply to each and every piece of evidence, but only to the totality of the evidence[117]: A judge may be unsure whether to believe witnesses A, B and C because their memory may have been hazy, their testimony hearsay or an outright lie; yet, if he is sure that he can believe the incriminating testimony of witnesses D – H and maybe the expert X in a case, then he has no reasonable doubt about the *guilt* of the defendant. Because it is a principle that attaches to the evaluation of evidence, the *in dubio* rule has no application for questions of law: If a certain provision can be given a strict and a lenient interpretation and clear guidance from the legislator is missing, the court is not obliged to choose the more lenient one if there are good reasons for choosing the strict one.[118] The question as to whether the rule applies to *factual* uncertainty in procedural matters as well, for example,

- whether the prosecution of an offence is barred by the statute of limitations[119],
- whether a request to prosecute was filed in time[120],
- whether double jeopardy is triggered[121],
- whether a young adult was still of the same developmental stage as a juvenile[122],
- whether the prosecution has to apply it when deciding whether to indict the suspect[123],
- whether on appeal a procedural bar is raised based on whether the defendant is unfit to stand trial[124],
- whether the withdrawal of an appeal was valid[125],
- whether a procedural error has occurred[126],

[117] Consistent jurisprudence of the courts: BGH NStZ 1999, 205; 2002, 656; NStZ-RR 2005, 209.
[118] BGHSt 14, 68.
[119] Yes: BGHSt 18, 274.
[120] Yes: BGHSt 22, 90.
[121] Yes: BayObLG NJW 1968, 2118.
[122] Yes: BGHSt 12, 116.
[123] No: OLG Karlsruhe NJW 1974, 806. – A certain amount of uncertainty is immanent in that stage of the proceedings; it will, however, play a part in the overall reflections of the prosecution about the likelihood of a conviction; OLG Karlsruhe Justiz 2003, 272; OLG Bamberg NStZ 1991, 252.
[124] No: BGH NStZ 1984, 181. – This must be distinguished from the scenario of whether a trial may take place if the *trial* judge *has* doubts about whether the defendant is fit to plead and none of the criteria in §§ 231(2) (voluntary unlawful absence of the defendant from the hearing) or § 231a (intentionally putting oneself in a state of unfitness to plead) are fulfilled: In that case the rule applies; BGH NStZ 1984, 520; BVerfGE 51, 324.
[125] No: BGHSt 10, 245.
[126] No: BGHSt 16, 164. – Procedural errors must be fully demonstrated by the appellant on appeal; as far as § 136a on forbidden means of interrogation is concerned, the appellate court must ascertain these for itself through the *Freibeweisverfahren* (discretionary evidence), i.e. the court is not bound to use the means of evidence provided for in the StPO for the purpose of establishing the guilt of the defendant (*Strengbeweis* – strict evidence): It may, for example, make a simple phone call to establish whether a violation has occurred, something it could not base a conviction on.

has been answered on a case-by-case basis so far.[127]

Open justice (Öffentlichkeitsgrundsatz)

§ 169 GVG has already been mentioned above under the heading of the *Mündlichkeitsprinzip*. It refers *only* to the trial proceedings, not to a duty of the courts to publicise their decisions adequately.[128] German law does, however, not subscribe to the understanding of open justice as practised in England and Wales, where it includes the right of the media to report about suspects from the earliest stages of the proceedings with inclusion of their full name, address and picture.[129] The open justice principle exists in a natural tension with the protection of the interests of victims, and the rules about the latter have been significantly strengthened in recent years.[130] The public may be excluded from the hearing for reasons of victim protection, for example in sexual offence cases, or if there is a concern based on public morality etc. The reasons are set out in §§ 170 – 175:

- Hearings in the family court and the cautelary jurisdiction (*Freiwillige Gerichtsbarkeit*) are in principle always *in camera*; the public may exceptionally be admitted, although not normally over the objection of one of the parties (§ 170 GVG);
- the public may be excluded in cases of a *Sicherungsverfahren* (§§ 413 – 415) with the aim of sequestering the offender in a mental health hospital or in custodial addiction treatment (§ 171a GVG);
- the court may exclude the public if in the course of a hearing the intimate sphere of any of the parties, victims or witnesses etc. is being discussed; this may include the defendant[131]; the exclusion must not be ordered if the protected person objects to it[132] (§ 171b GVG);

[127] KK-Pfeiffer/Hannich Einleitung Mn. 19 – 20.
[128] See KK-Pfeiffer/Hannich Einleitung Mn. 21.
[129] See the critical paper by Michael Bohlander, Open Justice or Open Season? (2010) Journal of Criminal Law 321.
[130] KK-Pfeiffer/Hannich Einleitung Mn. 21.
[131] MG § 171b GVG Mn. 3.
[132] This would appear to be unusual, but from my own experience as a judge in a slightly different scenario I remember the case of a young woman who had been raped and seriously sexually abused in various ways by the defendant, whilst being trapped in an elevator with him, for over half an hour, all the time being threatened by him with a weapon. When I asked her whether she wished to have the defendant excluded for the duration of her testimony about the intimate facts of the abuse, she answered: "No, he

- an exclusion may be ordered for reasons of national security, public order and morality; to protect life, limb or freedom of a witness; to protect an important business or trade secret or tax confidentiality, if the interets of the protected person outweigh that of an open court discussion; if a private secret is going to be discussed the divulging of which by an expert or witness might be an offence under § 203 StGB; if a person under the age of 18 is being heard (§ 172 GVG).

The verdict, i.e. the operating part or *Tenor* of the *Urteil* must always be pronounced in public, although the public may again be excluded for the reasons set out in §§ 171b, 172 GVG when the court gives its reasons for the decision (§ 173 GVG).

Conclusion

This paper is hoped to have served as a useful introduction to some of the fundamental parameters of German criminal procedure. Too many people outside the German system, even within the German-speaking world, have only nebulous ideas about the basic principles that guide its procedures. Labels such as "inquisitorial", "professional judiciary" and "bureaucratic procedures" that are bandied about, not infrequently in a derogatory manner, in the legal discussion between systems mislead its participants about the deeper meaning and history of such concepts and shroud the view at their actual shape in the modern world. German criminal procedure is certainly very different from, for example, English and Welsh law but, as can be seen from what was explained above, there is no longer any place for criticism based on badly and superficially informed statements such as those mentioned in the beginning of the paper about the burden of proof, the right to silence etc. German procedure is a sophisticated and sometimes admittedly overly regulated system that aims at finely balancing the competing interests of the public, the victims and the defence. As with any issue of public policy, there are often multiple and equally valid ways of reaching a solution to resolve that tension that is acceptable in a society. What some of the parties to the comparative discussion, it would appear, still must learn to understand, even after many years of comparative research on all sides, is that the fact that another system has made a choice one's own system has not made or maybe even frowns upon, is as such not a sufficient reason to denigrate

shall hear what he did to me!" She was, if it may be said to her credit, the deadliest of witnesses imaginable: calm, detached and precise in her memory despite the ordeal she had been subjected to. – Equally memorable, albeit for different reasons, was the defendant's counsel, also a woman, who started her closing speech with the words: "Life has many faces..." (*Das Leben ist vielfältig...*), insinuating that the victim may have enjoyed the events as "rough sex".

the other system as unjust. Comparative research is a fascinating endeavour and indispensable in modern law-making, not only because of the effects of European legal convergence and harmonisation, but also because of its importance for the creation of principles and rules of international law under Art. 38 of the Statute of the ICJ. Nothing could be worse in that context than making badly informed assumptions the basis for the creation of law at the European and international level.